Cite as 2018 Ark. App. 188

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-17-305

R.E.C. ENTERPRISES, LLC, D/B/A STAN EXCAVATING CO.
APPELLANT

V.

GAILLARD BUILDERS, INC.
APPELLEE

Opinion Delivered: March 7, 2018

APPEAL FROM THE MILLER COUNTY CIRCUIT COURT
[NO. 46CV-15-73]

HONORABLE CARLTON D. JONES, JUDGE

REMANDED IN PART AND DISMISSED IN PART

MIKE MURPHY, Judge

Appellant, R.E.C. Enterprises, LLC, d/b/a Stan Excavating Company, appeals from a declaratory judgment entered by the Miller County Circuit Court on January 23, 2017. The judgment (1) awarded appellee, Gaillard Builders, Inc., declaratory relief relating to appellant's failure to timely foreclose a purported mechanics' and materialmen's lien; (2) granted appellee's motion to compel arbitration; and (3) dismissed appellant's counterclaim. From that judgment, appellant appeals.[1] On appeal, appellant argues that the circuit court erred (1) in dismissing appellant's counterclaim; (2) in failing to make a finding regarding whether a valid arbitration agreement existed; (3) in not finding that the arbitration

[1]We note that we originally remanded this case to settle and supplement the record, and the deficiency has now been cured. *See R.E.C. Enterprises, LLC v. Gaillard Builders, Inc.*, 2017 Ark. App. 609.

agreement lacked mutuality of obligation; and (4) in not finding that appellee had waived the arbitration agreement. We remand in part and dismiss in part.

Appellee is a contractor and constructed a Dollar Tree in Texarkana, Arkansas. On January 25, 2012, appellee prepared a written subcontract agreement identifying "Gaillard" as the general contractor and "Stan Excavating LLC" as the vendor on the coversheet. The contract also refers to them respectively as "contractor" and "subcontractor."

On September 5, 2012, appellant filed a construction lien against appellee for the unpaid amount of $32,465.06. Appellee, in turn, obtained a surety bond. Appellant did not foreclose on the lien or commence a lawsuit within the statutorily mandated fifteen months. On March 31, 2015, appellee filed a complaint for declaratory judgment seeking a declaration that the lien and bond were null and void and that the parties be released. Appellant filed a counterclaim asserting breach of contract either for the amount it believed it was owed or for collection of the verified account; appellant argued appellee breached the contract by failing to pay what was owed even though appellant had completed its obligations by providing services and materials for the Dollar Tree job.[2]

Because appellant did not file an answer to the original complaint and the counterclaim did not address the complaint for declaratory judgment, appellee moved for default judgment on July 20, 2015.[3]

[2]The original counterclaim was superseded by an amended counterclaim that attached the subcontract agreement.

[3]Appellant eventually filed an answer to the original complaint on October 20, 2015.

On August 24, 2015, appellee moved to dismiss the amended counterclaim asserting that no contract existed between the named parties in the suit—the subcontract agreement identified the subcontractor as "Stan Excavating LLC" rather than "Stan Excavating Co." In response, appellant filed a second amended counterclaim to include a claim for reformation of the subcontract agreement to identify the subcontractor as "R.E.C. Enterprises, LLC, d/b/a Stan Excavating Company" asserting a scrivener's error and mutual mistake. Appellant also asserted alternate claims against appellee based on quantum meruit and unjust enrichment. Appellee's answer affirmatively asserted that it did not enter into a contract with the appellant; alternatively, any dispute regarding the contract must be compelled to arbitration in Mobile, Alabama, per a clause set forth in the subcontract agreement. On October 28, 2015, appellee filed a motion to compel arbitration and for dismissal of the second amended counterclaim even though appellee continued to dispute that it was a party to the subcontract agreement.

The circuit court conducted a hearing on March 3, 2016, to address these issues. In its judgment, file-marked January 13, 2017, the circuit court declared the lien and bond to be void, dismissed appellant's second amended counterclaim, and compelled arbitration. This timely appeal followed.

As a threshold matter, we address our denial of appellee's motion to dismiss appeal. In *R.E.C. Enterprises,* LLC, 2017 Ark. App. 609, we concluded that our court had jurisdiction over this appeal because we found that appellant appealed from a final order. Arkansas Rule of Appellate Procedure–Civil 2(a) provides that an appeal may be taken from a final judgment entered by the circuit court or, among other things, from an order denying

a motion to compel arbitration or granting a motion to stay arbitration. Here, the circuit court entered an order compelling arbitration, which is not appealable on these facts alone. *See Chem-Ash, Inc. v. Ark. Power & Light Co.*, 296 Ark. 83, 86, 751 S.W.2d 353, 354 (1988). However, Arkansas Code Annotated section 16-108-207(g) (Repl. 2016) says, "If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim." Here, the circuit court did not stay the proceedings pending arbitration. Instead, it dismissed the second amended counterclaim. We found that because there was nothing left pending in circuit court, appellant appealed from a final order as contemplated in Arkansas Rule of Appellate Procedure–Civil 2(a)(1).

We also denied appellee's alternative argument that we should dismiss the appeal because appellant failed to preserve its argument that dismissal of the counterclaim was improper. *R.E.C. Enterprises, LLC*, 2017 Ark. App. 609. We explained that our court summarily affirms if an argument is not preserved; we do not dismiss for lack of jurisdiction. *Id.*

We now turn to appellant's first point on appeal—whether the circuit court had authority to dismiss the second amended counterclaim. We must first address whether appellant's argument is preserved.

In *England v. Dean Witter Reynolds, Inc.*, 306 Ark. 225, 225–26, 811 S.W.2d 313, 314 (1991), appellants appealed from an order of dismissal of the lower court that granted the appellees' motion to compel arbitration and for dismissal. The circuit court in that order dismissed appellants' complaint and stated "[I]f they desire to further pursue their alleged

claims against the Defendants, (Plaintiffs) must do so in accordance with the arbitration agreements entered into by the parties"—which mirrors the language in the case at hand. On appeal, the supreme court dismissed the appeal explaining that an order compelling arbitration is not appealable. *Id.* The court also held in granting the motion to compel arbitration that the circuit court should not have dismissed the complaint but should have retained jurisdiction until the arbitration process was concluded. *Id.* Notably, preservation of this issue was not discussed.

Admittedly, appellant R.E.C. argues for the first time on appeal that the circuit court erred in dismissing the counterclaim. Generally, when a circuit court does not provide a ruling on an issue, it is an appellant's responsibility to obtain a ruling to preserve the issue for appeal. *Meador v. Total Compliance Consultants, Inc.*, 2013 Ark. 22, at 5, 425 S.W.3d 718, 721. We will not review a matter on which the circuit court has not ruled, and a ruling should not be presumed. *Blair v. Willis*, 2017 Ark. App. 324, at 4, 521 S.W.3d 535, 537, *review denied*, 2017 Ark. 250. However, combined with our holding and rationale in *England* and the plain language of the statute—"If the court orders arbitration, the court on just terms *shall* stay any judicial proceedings" (emphasis added)—we hold that the circuit court erroneously dismissed the counterclaim. Therefore, we direct the circuit court to stay the judicial action and to retain jurisdiction of the controversy until the arbitration process has been concluded.

We additionally dismiss appellant's remaining points on appeal based on our finding that an order compelling arbitration is not immediately appealable.

Remanded in part and dismissed in part.

VIRDEN and KLAPPENBACH, JJ., agree.

Craig L. Henry, for appellant.

Steel, Wright, Gray & Hutchinson, PLLC, by: *Alex T. Gray*, for appellee.